FILE COPY

Office Supreme Court, U.S.
FILED
AUG 14 1950
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. [redacted] 228

DONICI (TERRY) TAYLOR,
Petitioner,

vs.

TRANSWIND TRANSPORTATION COMPANY, LIMITED, (Formerly known as Allen Tours of Hawaii, Ltd.),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION.

J. RUSSELL CADES,
WILLIAM L. FLEMING,
4th Floor Bishop Trust Building,
Honolulu, T. H.,
Attorneys for Respondent.

Subject Index

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons for Denying the Writ	4
I. The Appellate Court Did Not Err in Applying the Federal Sufficiency of Evidence Test Where the Hawaii Sufficiency of Evidence Test is Identical to the Federal Test	4
A. More Than a Scintilla of Evidence Which Means Some Substantial Evidence is That Quantum of Evidence Required by Hawaii Law to Support a Jury Verdict	4
B. Substantial Evidence Which Means More Than a Scintilla of Evidence is Required by Federal Law to Support a Jury Verdict	7
C. The Question of Whether the Appellate Court Erred in Not Applying the Hawaii Sufficiency of Evidence Test is Moot Where the Hawaii and Federal Sufficiency of Evidence Tests are Identical	9
II. There is no Inconsistency Between the Two Opinions Rendered Below	9
Conclusion	10

Citations

	Pages
Commissioners v. Clark, 94 U.S. 278 (1877)	7
Consolidated Edison Co. v. National L. R. Bd., 305 U.S. 197 (1938)	8
Darey v. Harmon, 30 Haw. 12 (1927)	6
Dick v. New York Life Insurance Co., 359 U.S. 437 (1959)	9
Gunning v. Cooley, 281 U.S. 90 (1929)	8
Holstein v. Benedict, 22 Haw. 262 (1915)	5, 8
Kamalu v. Lovell, 5 Haw. 62 (1883)	7
Louis v. Victor, 27 Haw. 262 (1923)	6
Lyu v. Shinn, 40 Haw. 198 (1953)	6, 8
Reynolds v. Van Culin, 36 Haw. 556 (1943)	6
Robinson v. Honolulu Rapid Transit & Land Co., 20 Haw. 426 (1911)	5
Robinson v. Honolulu Rapid Transit & Land Co., 20 Haw. 466 (1911)	5
Ross v. Ins. Co., 28 Haw. 404 (1925)	6, 7
Solomon v. Niulii M. & P., Ltd., 32 Haw. 865 (1933)	6

Statutes

28 U. S. C. § 1254(1)	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 288

BERNICE (TERRY) TAYLOR,
Petitioner,

vs.

TRADEWIND TRANSPORTATION COMPANY, LIMITED, (Formerly known as Allen Tours of Hawaii, Ltd.),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit in this cause (R. 362) is reported at 267 F. 2d ____. The opinion of said Court denying petitioner's Petition for Rehearing (R. 372) is reported at 267 F. 2d ____.

JURISDICTION.

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered on April 21, 1959. (R. 370.) Petitioner's Petition for Rehearing was made and entered on June 9, 1959. (R. 373.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Is the Hawaii test of the sufficiency of evidence necessary to support a jury verdict so similar to the Federal test as to be indistinguishable therefrom?

2. Is it error for an Appellate Court on rehearing to clarify its original opinion?

STATEMENT OF THE CASE.

This action was brought in the United States District Court for the District of Hawaii by petitioner against the Soto Mission of Hawaii, Limited, a non-profit corporation (hereinafter called the "Mission"), and against respondent tour company to recover damages for personal injuries sustained as a result of a fall on the front steps of the Mission on June 13, 1956. During the course of trial counsel for petitioner conceded that his case against respondent would fail if there was insufficient notice on the part of Mr. Pagay, respondent's tour driver, of the existence of a dangerous condition at the Mission. (R. 250.)

Mr. Pagay testified that he was hired as a taxi driver by respondent on January 29, 1956 (R. 168) and worked for about two and one-half or three months as a taxi driver on the night shift before being moved to the day shift as a tour driver. (R. 169.) Testimony indicates that prior to the time Larry Pagay was employed by appellant he had on many occasions taken various people to view the Mission. (R. 181.) There is no evidence to show that he was employed by appellant on the one occasion on which he testified he saw a taxi driver slip on the Mission steps. (R. 177 and 170.) Respondent's tour driver stated that at the time he saw an unidentified taxi driver slip on the steps aforesaid, he was far from the scene (R. 171) and he had no opportunity to determine the cause or observe the details of the incident. (R. 178.) Based upon his observations, Mr. Pagay admitted on cross-examination that the steps of the Mission were less slippery than ordinary concrete steps (R. 181) and that prior to the time of petitioner's fall he had no experience of any unusual nature with the steps. (R. 174.) Mr. Pagay testified that he was not aware of any danger with respect to these steps until after petitioner's fall on June 13, 1956. (R. 181.)

On November 8, 1957, the Jury returned a verdict in favor of the Soto Mission, the owner of the premises, against petitioner (R. 43) and a verdict in favor of petitioner against respondent. (R. 44.) On appeal the United States Court of Appeals for the Ninth Circuit held that there was "no sufficient evidence"

by which the respondent had knowledge of the existence of the dangerous condition which brought into being any duty by respondent to warn petitioner of said condition. (R. 369.) On appeal both sides assumed that the Federal and the Hawaii tests were identical. Both in her original brief and in oral argument before the Circuit Court, petitioner contended that there was "substantial evidence" of notice of the condition aforesaid on the part of respondent to support the jury verdict rendered below. It was not until petitioner filed for a rehearing that she argued that the Hawaii test was more liberal than the Federal test and that the Hawaii test ought to be applied. On rehearing the Circuit Court clarified its original opinion and held that there was "no evidence" to establish any knowledge in respondent of a dangerous condition requiring it to warn petitioner of the condition aforesaid. (R. 372.) The Court in effect found it unnecessary to decide whether the Federal and Hawaii tests were similar.

REASONS FOR DENYING THE WRIT.

I.

THE APPELLATE COURT DID NOT ERR IN APPLYING THE FEDERAL SUFFICIENCY OF EVIDENCE TEST WHERE THE HAWAII SUFFICIENCY OF EVIDENCE TEST IS IDENTICAL TO THE FEDERAL TEST.

A. More than a scintilla of evidence which means some substantial evidence is that quantum of evidence required by Hawaii law to support a jury verdict.

It is unequivocally clear, there being no authority to the contrary, that "some substantial evidence" is

required by Hawaii law to support a jury verdict. The test of the sufficiency of evidence necessary to support a jury verdict (hereinafter called "the test") is judicial. Preliminarily, the trial judge must determine whether there is any adequate evidence by which a jury could properly find a verdict for the party producing the evidence and upon whom the burden of proof is imposed.

Petitioner, without once fully stating the Hawaii test in either its full or abbreviated form, in either her Petition for Rehearing before the Circuit Court or in her Petition for Writ of Certiorari before this Court has quoted the following from *Robinson v. Honolulu Rapid Transit & Land Co.*, 20 Haw. 426 (1911):

> ". . . But it has often been held that this court would not set aside a verdict where there was some evidence, i.e., more than a scintilla of evidence, to support it. . . ."

Inferentially petitioner assumes that the aforequoted portion of the *Robinson* case is the Hawaii test. Petitioner fails to indicate that in its opinion denying the Petition for Rehearing in the *Robinson* case, (20 Haw. 466 (1911)), the Supreme Court of Hawaii held at page 467 that a jury verdict would not be set aside where there was "some substantial evidence" to support it.

In *Holstein v. Benedict*, 22 Haw. 441 (1915) at page 445, the Supreme Court of Hawaii more succinctly set forth the Hawaii test as follows:

". . . The cases are not in harmony on the point as to what constitutes a scintilla of evidence. 'A mere scintilla of evidence, if it means anything, means the least particle of evidence—evidence which, without further evidence, is a mere trifle.' *Offutt v. Columbian Exposition,* 175 Ill. 472, 476. 'A scintilla of evidence is any material evidence, which, taken as true, would tend to establish the issue in the mind of a reasonable juror.' *Crosby v. Seaboard, etc., Ry.,* 61 S. E. (S.C.) 1064, 1067. 'Evidence may go beyond a mere scintilla, and yet not be substantial.' *Jenkins v. Cement Co.,* 147 Fed. 641, 643. *This court has held that the expression 'more than a scintilla of evidence' means 'some substantial evidence.' Robinson v. Rapid Transit Co.,* 20 Haw. 466. . . ." (Italics added.)

Additional clarifying phrases which have been adopted by the Hawaii Supreme Court as part of the Hawaii test include: "any substantial evidence, more than a mere scintilla." *Louis v. Victor,* 27 Haw. 262, 263 (1923). *Solomon v. Niulii M. & P., Ltd.,* 32 Haw. 865, 871 (1933); "the evidence must be of a character sufficiently substantial," *Ross v. Ins. Co.,* 28 Haw. 404, 408 (1925); "substantial evidence more than a mere scintilla," *Darcy v. Harmon,* 30 Haw. 12, 13 (1927), *Reynolds v. Van Culin,* 36 Haw. 556, 557 (1943); "the expression 'more than a scintilla of evidence' means 'some substantial evidence,'" *Lyu v. Shinn,* 40 Haw. 198, 205 (1953).

B. Substantial evidence which means more than a scintilla of evidence is required by federal law to support a jury verdict.

The Supreme Court of the Kingdom of Hawaii originally set forth the Hawaii test in *Kamalu v. Lovell*, 5 Haw. 62 (1883) at pages 63-4:

> "If a verdict for the plaintiff must have been set aside again, *cui bono* to leave it to the jury to determine the verdict. The authority of the Court to order a verdict is set forth by Mr. Justice Clifford, delivering the opinion of the Supreme Court in *Commissioners v. Clark*, 94 U.S. Supreme Court, at p. 284. He says, 'Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. Decided cases may be found where it is held that if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.'"

The Supreme Court of Hawaii in *Ross v. Ins. Co.*, *supra*, reaffirmed its adoption of the test set forth in *Commissioners v. Clark*, 94 U.S. 278 (1877). In further clarifying the Hawaii test the Supreme Court

of Hawaii has had occasion to rely upon Federal cases. (e.g., *Holstein v. Benedict, supra.)*

At page 2 of her Petition for Writ of Certiorari, petitioner erroneously assumes that the Hawaii test is more liberal than the Federal test. Thus, petitioner contends that the Circuit Court has erred in this cause. To support its holding (R. 369), the Circuit Court relied in part on *Gunning v. Cooley,* 281 U.S. 90 (1930), wherein this Court stated at page 94:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' *Schuylkill & D. Improv. & R. Co. v. Munson,* 14 Wall. 442, 448, 20 L.ed. 867, 872; *Pleasants v. Fant,* 22 Wall. 116, 122, 22 L.ed. 780, 783."

In defining the Federal test this Court has stated that "substantial evidence is more than a mere scintilla." (*Consolidated Edison Co. v. National L. R. Bd.,* 305 U.S. 197, 229 (1938)). For purposes of the Hawaii test "the expression 'more than a scintilla of evidence' means 'some substantial evidence.'" *Lyn v. Shinn, supra.* By their very terms, it is manifestly clear that the Federal and Hawaii tests are in fact identical. The instant petition is unique in its attempt to distinguish the indistinguishable.

C. The question of whether the Appellate Court erred in not applying the Hawaii sufficiency of evidence test is moot where the Hawaii and federal sufficiency of evidence tests are identical.

Petitioner contends that this Court should grant petitioner's Petition for Writ of Certiorari and cites *Dick v. New York Life Insurance Co.*, 359 U.S. 437 (1959), for the proposition that the Circuit Courts are not in agreement as to whether the state or federal test should be applied to a diversity case. Where, such as in the instant case, the tests are identical, the question is moot or at best academic. This reality has been recognized by this Court at page 445 of the *Dick* case, *supra:*

> "... Under these circumstances, we will not reach out to decide this important question particularly where, in the context of this case, the two standards are substantially the same. ..."

II.

THERE IS NO INCONSISTENCY BETWEEN THE TWO OPINIONS RENDERED BELOW.

In holding that there was "no sufficient evidence" by which there came into being a duty on the part of respondent to warn petitioner (R. 369), the Ninth Circuit Court conveyed the opinion that there was less than some substantial evidence to support the jury verdict rendered below. How much evidence there might have been was left in doubt. On rehearing, this doubt was questioned and the Circuit Court held that there was "no evidence, not even a scintilla"

to support the verdict rendered below. The Court of Appeals has discharged its duty of examining the record in detail and it is evident from a reading of the original opinion that the so-called "proof" of the petitioner is in fact properly characterized by the Appellate Court in its opinion denying petitioner a rehearing. Petitioner's contention that the later clarifying opinion of the Ninth Circuit Court was inconsistent with its former opinion, is, on its face, so fallacious as to warrant no additional comment.

CONCLUSION.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated, Honolulu, Hawaii,
August 6, 1959.

Respectfully submitted,
J. RUSSELL CADES,
WILLIAM L. FLEMING,
Attorneys for Respondent.